IN THE

Supreme Court of the United States

October Term, 1959

No.

G. T. RUMMEL, MATTHEW P. ROWE, ROY M. EIDAL, M. M. HARDIN, doing business as LA SALLE MINING COMPANY, a Partnership,

Appellants,

v.

WILLIAM E. MUSGRAVE, as County Assessor of Montrose County, Colorado; RUTH E. GAINES, as County Treasurer of Montrose County, Colorado; ORIN E. SMITH, FRED E. SULLIVAN and DON E. WATSON, as the Board of County Commissioners of Montrose County, Colorado; and TIM ARMSTRONG, State Treasurer of the State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS

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Appellees move that the appeal of the Appellants in the within action be dismissed, or, in the alternative, to affirm the judgment below, on the ground that the appeal presents no question sufficiently substantial to warrant further argument.

STATEMENT

Appellants, G. T. Rummel, Matthew P. Rowe, Roy M. Eidal, M. M. Hardin, private citizens engaged in the mining business for private profit, seek by this action to clothe themselves with Governmental immunity and thereby obtain an economic advantage over other private citizens engaged in the mining industry in the State of Colorado. The Government of the United States is not a party and is not questioning the constitutionality of the statutes of the State of Colorado.

I.

THE STATUTE IN QUESTION, CHAPTER 137-5-4, COLORADO REVISED STATUTES, 1953, VOL. 5, PAGE 926, DOES NOT LEVY A TAX ON LANDS OF THE UNITED STATES OF AMERICA. THE STATUTE DOES LEVY A TAX ON THE POSSESSORY INTEREST OF THE APPELLANTS WHICH THEY OBTAINED BY LEASE FROM THE UNITED STATES OF AMERICA AND WHICH THE APPELLANTS HAVE USED TO THEIR GREAT ECONOMIC PROFIT.

Colorado Revised Statutes, 1953, 137-5-4 provides:

> "Assessment of producing mines. *All* mines and mining claims bearing gold, silver, lead, copper or other precious or valuable minerals and *possessory rights therein classified under the laws of this state as producing mines* shall be assessed annually for the purposes of taxation as provided in this section: . . ."

Taxation by the State of Colorado of the possessory interest in a mine on federal lands does not violate the Constitution of the United States or the statutes thereof.

It is contended by the Appellants that the tax levied against them is in effect a tax upon the property of the United States of America and that they are agents and servants of the United States entitled to the federal immunity from state taxation.

Early in the history of the State of Colorado it was contended that a tax upon a mine on unpatented public domain was a tax on the property of the United States and beyond the jurisdiction of the State. This contention was clearly overruled by the Supreme Court of the United States in *Elder v. Wood*, 208 U.S. 226, 231:

> "The title to the land on which this mining claim was located was in the United States. It was a part of the public lands, and although proceedings had been begun by the owners of the claim for the acquisition of the title to the land by patent, they were not concluded at the time of the assessment of the tax, and apparently no patent has ever been issued. Obviously the land was not taxable as the property of Wilhelmina Gude. The act by which the people of the territory of Colorao were enabled to form a state (§4 of act approved March 3, 1875, 18 Stat. at L. 474, chap. 139) provided that no taxes should ever be imposed upon lands or property of the United States. The claim of a Federal right was based upon this statute. But, assuming that under this statute a Federal question is raised, there was no taxation of the land in the case at bar. A statute of Colorado authorized the taxation of mining claims, whether patented or entered for patent or not, in these words: 'In case the mine or mining claim shall not be patented, or entered for a patent, but shall be assessable and taxable under this act on account of producing gross pro-

ceeds then, and in that case, the possession shall be the subject of the assessment, and if said mining property be sold for taxes levied, the sale for such taxes shall pass the title and right of possession to the purchaser, under the laws of Colorado.' Laws 1887, pp. 340, 341, Mill's Anno. Stat. §§3222-3225. The construction of this statute and the conformity to it of the proceedings of the taxing officials were questions exclusively for the supreme court of the state, and we have no authority to review its determination of them. That court held that what was assessed was not the land on which the mining claim was located, but the claim itself; that is to say, the right of possession of the land for mining purposes. It is agreed that the Comstock lode was a 'valid subsisting mining location,' and, at the time of the assessment of the tax, Wilhelmina Gude was the owner of the undivided interest in it which is in controversy here. Such an interest from early times has been held to be property, distinct from the land itself, vendible, inheritable, and taxable. Forbes v. Gracey, 94 U.S. 762, 24 L. ed. 313; Belk v. Meagher, 104 U.S. 279, 283, 26 L. ed. 735, 737; Mannel v. Wulff, 152 U.S. 505, 510, 38 L. ed. 532, 534, 14 Sup. Ct. Rep. 651; St. Louis Min. & Mill. Co. v. Montana Min. Co., 171 U.S. 650, 655, 43 L. ed. 320, 322, 19 Sup. Ct. Rep. 61; 1 Lindley, Mines, §§535 to 542, inclusive. The state, therefore, had the power to tax this interest in the mining claim and enforce the collection of the tax by sale. The tax deed conveyed merely the right of possession and affected no interest of the United States."

The basic rights held by the locator of a mining claim and by the Appellants as lessees of the United States are substantially the same. Each has the right of possession

of property the fee of which is owned by the United States. Each has the right to remove and sell valuable minerals from the land and thereby obtain an economic profit. This court in the case of *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342, 69 S. Ct. 561, 93 L. Ed. 721, discussed the rationale underlying intergovernmental taxation and stated:

> "It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions to restrict the scope of *immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation.* The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one.
>
> Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point together with later ones deviating in rationale. It is of substantial importance both for the states' powers of taxation and for the subjects on which they may impinge. Moreover, even though the immediate questions are closely related to federal policies concerning Indian lands, they are equally tangent to considerations affecting other types of situations raising questions of immunity. For these reasons it will not be amiss to consider the questions in the context of two conflicting courses of decision.
>
> Before we turn to the survey, however, two delimitations of the specific issues should be made.

These cases present no questions concerning the immunity of the Indian lands themselves from state taxation. There is no possibility that ultimate liability for the taxes may fall upon the owner of the land. Cf. Wilson v. Cook, 327 U.S. 474, dissenting opinion 489, 90 L. ed. 793, 804, 66 S. Ct. 663. Nor, as has been noted, do the cases involve challenges to the immunity from state taxation of royalty oil, the Indian's share of production.

and

"The Mountain Producers case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a *repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national.* The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax.

Since that decision, as we have noted, the process has been reversed in direction. True intergovernmental immunity remains for the most part. But, so far as concerns *private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption.* In the light of the broad groundings of the Mountain Producers decision and of later decisions, we cannot say that the Gipsy Oil, Large Oil and Barnsdall Refineries decisions remain immune to the effects of the Mountain

Producers decision and others which have followed it. They are out of harmony with correct principle, as were Gillespie and Coronado decisions and, accordingly, they should be, and they now are, overruled. This accords with the result reached in Santa Rita Oil & Gas Co. v. State Bd. of Equalization, 112 Mont. 359, 114 P. 2d 421. Moreover, since the decisions in Choctaw, O. & G. R. Co. v. Harrison, 235 U.S. 292, 59 L. ed. 234, 35 S. Ct. 27, and Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522, 60 L. ed. 779, 36 S. Ct. 453, both supra, rest upon the same foundations as those underlying the Gipsy Oil, Large Oil and Barnsdall Refineries decisions, indeed supplied those foundations, we think they too should be, and they now are overruled." (Emphasis supplied.)

This Court also discussed the rationale underlying the question of intergovernmental taxation in *U. S. v. Detroit*, 355 U.S. 466; pages 469 and 470, 78 S. Ct. 474, 2 L. Ed. 2d 424:

"This Court has held that a State cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress. McCulloch v. Maryland (U.S.) 4 Wheat. 316, 4 L. Ed. 579; Van Brocklin v. Tennessee, 117 U.S. 151, 29 L. ed. 845, 6 S. Ct. 670. At the same time it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government. See, e.g., James v. Dravo Contracting Co., 302 U.S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 ALR 318; Graves v. New York, 306 U.S. 466, 83 L. ed. 927, 59 S. Ct.

595, 120 ALR 1466; Alabama v. King & Boozer, 314 U.S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 ALR 615. Of course in determining whether a tax is actually laid on the United States or its property this Court goes beyond the bare face of the taxing statute to consider all relevant circumstances.

The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clearly that there was no attempt to levy against its property or treasury.

Nevertheless the Government argues that since the tax is measured by the value of the property used it should be treated as nothing but a contrivance to lay a tax on that property. We do not find this argument persuasive. *A tax for the beneficial use of property*, as distinguished from a tax on the property, itself, has long been a commonplace in this country. See Henneford v. Silas Mason Co., 300 U.S. 577, 582, 583, 81 L. ed. 814, 818, 819, 57 S. Ct. 524. In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold. Public Act 189 was apparently designed to *equalize the annual tax burden carried by private businesses using exempt property with that of similar businesses using non-exempt*

property. Other things being the same, it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval. In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used."

And at pages 472 and 473:

"Here we have a tax which is imposed on a party using tax exempt property of its own 'beneficial personal use' and 'advantage.'

It is undoubtedly true, as the Government points out, that it will not be able to secure as high rentals if lessees are taxed for using its property. But as this Court has ruled in James v. Dravo Contracting Co., 302 U.S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 ALR 318; Alabama v. King & Boozer, 314 U.S. 1, 86, L.ed. 3, 62 S. Ct. 43, 140 ALR 645, and numerous other cases, *the imposition of an increased financial burden on the Government does not by itself vitiate a state tax.* King & Boozer offers a striking example. There a private party, acting under contract with the United States, purchased materials which the contract required him to transfer to the Government. At the same time the Government agreed to pay his costs plus a fixed fee so a state excise levied on his purchase was passed directly and completely to the Government. Yet despite the immediate financial burden imposed on the United States, this Court, without dissent, upheld the tax.

We are aware of course that the general princi-

ples laid down in Dravo, King & Boozer and subsequent cases do not resolve all the difficulties in the area of intergovernmental tax immunity, but they were adopted by this Court, with the full support of the Government, as the least complicated, the most workable and the proper standards for decision in this much litigated and often confused field and we adhere to them."

II.

"THE STATUTE IN QUESTION DOES NOT CREATE A LIEN ON THE LANDS OF THE UNITED STATES, BUT UPON THE POSSESSORY INTEREST OF THE APPELLANTS.

Chapter 137-5-4(3) Colorado Revised Statutes, 1953, provides in the event of non-payment of taxes the right of possession of the operator may be sold.

". . . . then the possession shall be the subject of the assessment and if said mining property shall be sold for taxes levied the sale for such tax shall pass the title and the right of possession to the purchaser under the laws of Colorado, . . ."

Clearly the "property" to be sold is the bundle of rights giving rise to the right of possession, the location in case of a mining claim, the lease, in case of the Appellants. It is not the fee title the statute is speaking of. *Elder v. Wood*, supra.

Appellants complain that the County of Montrose can not sell their interest in the lease because the United States must approve any assignment of the lease. Again the private individuals are seeking to rely upon a right

vested in the United States, which the United States has not asserted for themselves. In the first place the Appellants' interest in the lease in this case has not been sold for non-payment of taxes. Secondly, there is no reason to presume that the person who would buy Appellants' interest in the lease at a tax sale would not be fully qualified to mine the land and fully acceptable to the United States. Surely there are other qualified miners than the Appellants.

If it be assumed that the lease could not be sold at tax sale, it is elementary that this would not discharge the tax liability but that the tax could be collected by civil action for the debt. We quote from *Pinnacle Gold Mining Co. v. People*, 58 Colo. 86, 91, 143 P. 837:

> "The authorities are not in accord, but it seems to us that the better way to dispose of it is to say that if the special remedy provided by the statute for the collection of taxes is not effectual to compel the payment in spite of the taxpayer's determination not to pay, then resort may be had to an action against the taxpayer; otherwise the revenue of the state would depend upon the willingness of the taxpayer to pay, and experience has demonstrated that taxes are paid with more or less [illegible] alacrity.

In a note in 11 L. R. A. 818, it is said that the preponderance of the authorities is to the effect that either debt or assumpsit may be maintained for the recovery of the taxes as debt lies for a sum of money certain, due by statute. In State v. Georgia Co., 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485, it is said that a tax "is not a debt in its most limited sense; that is, it is not liable to set-off and the other incidents of a

simple contract between individuals. This is so on grounds of public policy, and also because though a debt (or due) it does not arise out of contract * * *. But it is a debt in the higher sense of the word.'

If the legislature has not provided the state with an effectual remedy to collect the debt due it, it appears to be reasonable to say that the state may resort to the ordinary remedy provided in the case of any other corporati .. to whom a debt is due."

The lien created by chapter 137-1-3 Colorado Revised Statutes, 1953:

"* * * Taxes levied upon real estate shall be perpetual lien upon such real estate, until such taxes and any penalty, charges and interest which may accrue thereon shall be paid, and such liens have priority over all other liens. * * *"

and by Colorado Session Laws, 1957, Chapter 267, page 806, Sec. 13:

"Taxes levied upon real estate shall be a perpetual lien upon such real estate until such taxes and any interest, penalties and charges which may accrue thereon shall have been paid, except as otherwise provided in this chapter, and such liens shall have priority over all other liens. * * *"

means a lien on the possessory interest of the operator, the location in the case of a mining claim, the lease in the case of the Appellants. *Elder v. Wood*, supra. It does not create a lien on the fee title of the United States.

III.

THE STATUTE DOES NOT DISCRIMINATE AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALS.

Appellants in this appeal seek to raise for the first time the question that the statute, 137-5-4 Colorado Revised Statutes, 1953, discriminates against the United States and those with whom it deals. The alleged discrimination was not referred to in the Appellants' complaint; it was not argued to the trial court; no evidence was presented in the trial court to show such discrimination. The question was not argued in Appellants' brief before the Supreme Court of Colorado.

The statute does not make any exception on possessory interests. It says "*All* mines and mining claims . . . and possessory interests therein classified under the laws of this state as producing mines shall be assessed annually for the purpose of taxation as provided in this section:" 137-5-4, Colorado Revised Statutes, 1953.

The conclusion that a private person holding a mining lease from the State of Colorado, or any of its sub-divisions or from any charitable institution would not be subject to the same tax as a lessee from the United States is not supported by the record, the statute in question and is contrary to the fact.

Chapter 137-5-4, Colorado Revised Statutes, 1953, is in no way comparable with Article 5248 of the Revised Civil Statutes of Texas, as amended in 1950, which was discussed in *Phillips Chemical Co. v. Dumas*, ... U. S. ....., 4 L. ed. 2d, 384, at pages 386 and 387. "Article 5248 before provided a general tax exemption for land and im-

provements held, owned, used and occupied by the United States for Public purposes. In 1950, the Texas Legislature added two provisions to Article 5275, one providing for taxation of privately owned personal property located on federal lands, and the other as follows:

> "(P)rovided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions, . . .
>
> "Article 7173 of the Revised Civil Statutes of Texas imposes a distinctly lesser burden on similarly situated lessees of exempt property owned by the State and its political subdivisions."

This Court logically held that lessees of the Federal government were not being treated the same as lessees from the State of Texas and its political subdivisions. *Phillip v. Dumas*, supra.

However, the situation created by the statutes in the *Phillips* case has no similarity to this case. A lessee of mining property is treated exactly the same whether the owner of the fee is the United States or the State of Colorado or any of its political subdivisions or a charitable institution. The fact that the owner of the fee in either case is exempt from taxation does not exempt the lessee from taxes put on his possessory interest. Neither does different fee ownership give rise to any different method or amount of taxation.

This statute, 137-5-4 Colorado Revised Statute, 1953, does not levy a tax on lessees of lands not used for mining purposes whether the owner of the fee is the United States, the State of Colorado or any of its political subdivisions. The lessees of the United States are treated exactly the same as lessees of the State of Colorado and its political subdivisions.

The statutes permit equal opportunity for lessees of land owned in fee by an exempt entity to share in the payment of local and state taxes with other private persons engaged in business for a profit.

The statute, 137-5-4 Colorado Revised Statutes, 1953, is in harmony with the statement in *U. S. v. Detroit*, supra, pages 473 and 474.

> "But here the tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities. The class defined is not an arbitrary or invidiously discriminatory one. As suggested before the legislature apparently was trying to equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property. Those using exempt property are required to pay no greater tax than that placed on private owners or passed on by them to their business lessees. In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair

share of local tax responsibility. Cf. Henneford v. Silas Mason Co., 300 U. S. 577, 583-585, 81 L. ed. 814, 819, 820, 57 S. Ct. 524. Nor is there any showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by Appellees demonstrates that lessees of other exempt property have also been taxed."

CONCLUSION

For the foregoing reasons it is submitted that the Appeal be dismissed.

Respectfully submitted,

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